No. 83-173

In The
Supreme Court of the United States
October Term, 1983

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MILTON R. WASMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

REPLY BRIEF FOR PETITIONER

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Jay R. Moskowitz
Sands & Moskowitz, P.A.
Suite 501
200 S.E. First Street
Miami, Florida 33131
(305) 371-6777
Counsel for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

I. The goal of Pearce was to take vindictiveness and the fear of vindictiveness out of the appeal and re-sentencing process.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court laid to rest the claim that double jeopardy

always precludes an enhancement of sentence following re-trial after a first conviction is reversed on appeal. Contrary to the suggestion of the Respondent (Br. 15), the Petitioner is not, in this case, asking this Court to re-visit the double jeopardy aspects of *Pearce*. This case deals specifically with what types of intervening action may give rise to an enhanced sentence.

Respondent suggests that this Court, in *Pearce* and subsequent cases, was trying to protect against actual vindictiveness from playing any role in the sentencing process. (Br. 13-20). It is clear that the elimination of vindictiveness from the re-sentencing process is the key. But the difficulty comes about in a defendant's ability to prove that the trial judge was acting out of vindictiveness when he increased the defendant's sentence following a successful appeal and subsequent re-trial. As this Court pointed out, subconscious motivations may come into play. *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 2491. (1982). How does a defendant prove that a judge was subconsciously motivated when the judge himself may not even realize that he was?

In *Pearce*, this Court clearly indicated not only that due process requires that vindictiveness must play no role in the re-sentencing process but also that:

> since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. [footnote omitted].
>
> 395 U.S. at 725.

This court then went on to state the prophylactic rule at issue here including the language that to enhance the trial judge must point to conduct on the part of the defendant occurring after the first sentencing hearing. Clearly that rule and the language used was designed to carrying out the due process concerns discussed immediately above its pronouncement. And rightly so. If between the first and second sentencing hearings, the defendant commits no new bad act, there is no need for enhancement. (See Petitioner's Opening Brief, pp. 13-17 and Section II *infra*).

II. To exclude from consideration an intervening conviction based on pre-existing conduct does not interfere with the sentencing process or allow a defendant to receive an undue benefit

The Respondent, in its brief, fears that to adopt the Petitioner's argument would exclude key information from consideration at sentencing resulting in the defendant's receiving an undue benefit (See e.g., Br. 26, 35-36). To see that these concerns are unwarranted, it is only necessary to look to the facts of this case.

Petitioner had two indictments pending, one involving obtaining a passport using a false name in violation of 18 U.S.C. §1542 and another charging mail fraud (18 U.S.C. §1341). The passport case went to trial and a conviction resulted. (J.A. 2-3). Following sentence, an appeal was taken. During the pendancy of that appeal, the Petitioner, through negotiations, resolved the mail fraud case when that indictment was dismissed and replaced by a misdemeanor information charging possession of false certificates of deposit. (18 U.S.C. §480). To that information, the Petitioner pled *nolo contendere*

(See appendix to opening brief, App. 1-15) and was given a probationary sentence. (App. 16-39). At the time of sentence in that misdemeanor case, the district judge (the Honorable Edward B. Davis) was able to and did take into account the complete criminal record of the Petitioner including the passport conviction then pending on appeal. (App. 39). Thus, a United States District Judge set a sentence for the Petitioner with both the passport and false certificates convictions before him for consideration. That he arrived at a probationary sentence is, or should be, of no consequence. That judge clearly had the ability to sentence the Petitioner to whatever he deemed appropriate under the law.

To preclude Judge Roettger (the passport case) from also considering the two convictions because the false certificates case facts pre-date his first sentencing of the Petitioner does not interfere with the sentencing process but rather merely removes from it an improper pyramiding of sentences.[1]

In attempting to further its claim that Petitioner is in error in his position, the Respondent posits the situation of a defendant who pled guilty and received a lenient sentence because of it, and then "retain[s] the benefit of that lenient treatment at a retrial even though the defendant elects to go to trial." (Respondent's Br. 36). Respondent does not say how that hypothetical defendant

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[1] At footnote 20 of its brief (p.38), Respondent tries to say that the false certificates case is separate and apart from the mail fraud case. Clearly, that is not the case as the trial attorney for the Government agreed, based upon good faith negotiation, presumably having benefit to both sides, to dismiss the mail fraud indictment and file instead the misdemeanor false certificates information (App. 1-15).

obtains his trial after having pled guilty but, in any event, it would seem clear that should he withdraw his plea and go to trial, the sentence to be imposed if conviction results need not be limited to the sentence imposed as part of the bargain that the defendant broke.

Additionally, Respondent postulates that if intervening convictions based upon pre-existing facts cannot be considered on re-sentencing, judges may "decide to consider pending charges at the time of first sentencing to prevent the defendant from escaping without any consideration of the conduct underlying the intervening conviction." (Respondent's Br. 33-34). But that statement falls from its own weight. Clearly the defendant will not "escape without any consideration of the conduct underlying the intervening conviction." That conduct will be considered and it will be considered by the person best able to give that conduct its fair weight. It will be considered by the judge who presided at the trial that resulted in that intervening conviction. That judge, as did Judge Davis here, will be fully able to consider the facts and make out a proper sentence. On the other hand, if a charge pending at the time of first sentencing results in a dismissal, then clearly the fact of the charge should not be considered for any purpose. Thus, the procedures of Judge Roettger and others like him of not considering pending charges at sentencing need not be altered. No defendant will escape punishment when those charges result in conviction.

At page 39 of its brief, Respondent argues that under the Petitioner's view there is never an appropriate time when the information about the false certificate conviction should be considered. That is not so. It should

have been and was considered when the Petitioner was sentenced in that case. Petitioner does not contend that in no case should an enhancement of sentence be permitted following re-trial and re-conviction. But where, as here, the Petitioner did nothing between the first and second sentencing hearings except to resolve a pre-existing factual situation in court by plea for which he was duly sentenced, enhancement is improper.

CONCLUSION

For the reasons set forth in his opening brief and the additional comments contained herein, the Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed and the case remanded to the district court for re-sentencing before a different district judge.

Respectfully submitted,

JAY R. MOSKOWITZ
Suite 501
200 S.E. First Street
Miami, Florida 33131
(305) 371-6777

Counsel for Petitioner

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